IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 13477 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SAIYED REAFIK SAIYED KADIR

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 13477 of 2004

MS BANNA DUTTA FOR MS KD PARMAR for Petitioner

MRS HB PUNANI, AGP for Respondents

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 22/02/2005

ORAL JUDGEMENT

1. This Special Civil Application under Article 226 of the Constitution of India has been filed by the petitioner challenging his detention in pursuance of the order passed against him by the Police Commissioner,

Surat City, on 25th June, 2004, in exercise of powers conferred upon him under Section 3(1) of the Gujarat Prevention of Anti Social Activities Act, 1985 (PASA Act for short). The petitioner is under detention as cruel person from 25th June, 2004 in pursuance of the above order.

2. The grounds of detention as placed on record reveal that the detaining authority took into consideration two types of materials to arrive at the subjective satisfaction. Firstly, the detaining authority relied upon registration of two crimes against the petitioner under Sections 8, 9 and 10 of the Bombay Animal Preservation Act, 1954, first before DCB Police Station on 13th June, 2004 and second before Limbayat Police Station on 4th April, 2004. In first case, it was alleged that the petitioner was found in possession of meat of cows, bulls and calves to the extent of 3200 Kg. The petitioner also found in possession of axes five in numbers, knives six in numbers etc. While in second case, the petitioner was found in dealing with mutton of the animals in breach of the provisions of the Bombay Animal Preservation Act, 1954. The detaining authority thoroughly and exhaustively examined investigation papers in both the cases and came to the conclusion that the petitioner was cruel person within the meaning of Section 2(bbb) of the PASA Act.

3. The detaining authority also relied upon two incamera statements as recorded by the sponsoring authority on 16th June, 2004 and 17th June, 2004 and verified by the detaining authority on 23rd June, 2004. The first witness referred to an incident occurred on 18th April, 2004, the witness was sitting within the area of Limbayat Police Station along with his goods carriage vehicle. At about 7.00 P.M., the petitioner and other persons approached him and stated that they needed goods carriage vehicle of the witness on hire to take the same at village Valan. The witness knew that the petitioner and other persons along with the petitioner were arrested in crime registered against them for transporting mutton of animals in contravention of law and hence, the witness refused to give his vehicle on hire to the petitioner. The petitioner got excited on refusal of the witness and started giving abuses. The witness was caught hold of by the petitioner and his accomplices started beating the witness. The witness raised shouts for help which attracted passerby, vehicle drivers and traders men of the locality and a crowd was gathered there some of them attempted to rescue the witness but the petitioner threatened them and his accomplices rushed towards the

crowd with weapons in their hands. To save their own life, people started running helter-skelter. The petitioner and his gang inflicted blows on the vehicle which came in their way, the traffic was disrupted, the shop keepers of the locality closed their business and residents of the locality locked themselves in their houses, the normal life was disturbed and fear and terror was spread in the area. The second witness referred to an incident occurred on 16th May, 2004, the witness was present in a stable owned by him, situated within Limbayat area. At about 12.00 P.M., the petitioner and his accomplices approached the witness and asked the witness to sell aged cows to the petitioner. The witness knew that the petitioner was doing the business of slaughtering animals and selling the meat of such animals in contravention of law. Therefore, the witness refused to sell any animals to the petitioner. On such refusal, the petitioner was excited and started giving abuses to the witness. The witness was caught hold by the petitioner and others started beating the witness with fists and kicks. The witness raised shouts for help which attracted a crowd, and some persons from the crowd dared to rescue the witness, but on the direction of the petitioner, his accomplices rushed towards the crowd with open knives to beat them and due to fear, persons started running helter-skelter. The petitioner and his accomplices damaged the vehicles came in their way. The traffic was disrupted the residents of the locality due to fear locked themselves in their houses, people of the locality felt insecurity because atmosphere of terror and fear was created.

4. Relying on the above materials, the detaining authority came to the conclusion that the petitioner was of ferocious temperament and used to keep deadly weapons with him. The detaining authority came to the conclusion that, the petitioner was of a cruel mind. The detaining authority also came to the conclusion that along with his accomplices, the petitioner engaged in activities of purchasing cows, bulls and calves from the Rural area and after slaughtering them, the petitioner was selling meat of such animals in urban area. The petitioner also used to disbelieve force to co-operate other persons in his activities and whoever refused to co-operate, became victim and got beating at the hands of the petitioner and his gang. In view of the detaining authority, the activities of the petitioner were prejudicial to the maintenance of public order. The detaining authority reached to the subjective satisfaction that the activities of the petitioner were required to be prevented forthwith. After considering remedial measures

which might be taken against the petitioner. The detaining authority reached to the conclusion that there was no other alternative, except to detain the petitioner under the PASA Act as cruel person. The detaining authority, therefore, passed an order of detention of the petitioner, which is under challenged in this petition.

5. Learned advocate Ms.Banna Dutta for Ms.K.D.Parmar for the petitioner and learned AGP Mrs.H.B.Punani for the respondents were heard at length.

6. The various grounds urged on behalf of the petitioner to challenge the order of detention as strongly and vehemently opposed and controverted by the learned AGP, it appears that the petition is required to be examined and disposed of, on the sole issue as to whether the right of the petitioner as guaranteed under Article 22(5) of the Constitution of India, is violated.

7. Learned advocate for the petitioner has placed on record a copy of the letter signed by the Manager, Customer Care Centre, Gandhinagar of Postal Department addressed to the learned advocate for the petitioner. The letter is dated 10th February, 2005, short contents of letter are as under:-

"Dear Sir/Madam,

In continuation of our letter dated 17/01/2005, it is to inform you that the Non Receipt of Acknowledgment of Registered Letters with Transaction No.555 dated 26/08/2004 of GUJARAT HIGH COURT was settled with the following comment. The RI u/r has been delivered on 30/08/2004 to PF Commissioner instead of Police Commissioner."

8. This is in respect of the contentions raised by the petitioner that though the petitioner addressed a representation against his detention on 26th August, 2004 to the detaining authority, but the same was not decided. This is a case of unique facts wherein neither detaining authority nor the State Government can be saddled with the liability to violate the right of the petitioner to adjudicate the representation of the petitioner as expeditiously as possible. The fact disclosed that the petitioner undoubtedly, addressed the representation to the detaining authority through the registered

acknowledgment due post. The petitioner did not receive acknowledgment receipt back through post. On inquiry, it was found by the petitioner that the said envelopment containing representation of the petition against the detention was erroneously delivered by the Postal Dept. to P.F. Commissioner in stead of detaining authority i.e. Police Commissioner, Surat City. The resultant effect is though the petitioner preferred effective representation to the detaining authority, but the detaining authority never received such representation and, therefore, the question of deciding such representation, either by the detaining authority or by the State Government does not arise at all, at the same time it cannot be denied that the petitioner duly addressed the representation in time to the detaining authority, but this inconvenient situation has arisen on account of erroneous delivery of such post by postal services to P.F. Commissioner instead of Police Commissioner, Surat.

9. The prime question, therefore, arises for determination that whether in such circumstances though the petitioner addressed the representation duly to the detaining authority, but in aforesaid circumstances neither detaining authority nor State Government received such representation, right as enshrined vide Article 22(5) of the Constitution of India is violated so as to vitiate the further detention of the petitioner.

10. After giving anxious and carefully consideration to issue it becomes necessary that the nature of the right which is guaranteed by Article 22(5) of the Constitution of India must be viewed carefully. Article 22(5) of the Constitution of India enjoins upon the appropriate Government or the detaining authority to accord the detenu earliest opportunity to make a representation and to consider that representation forthwith. Such obligations upon the detaining authority and the State Government are enjoined because the right guaranteed under Article 22(5) of the Constitution of India emanates directly from the concept of human liberty. The object of preventive detention law is preventive action and not punitive. The concerned authority acting under preventive detention law, therefore, are enjoined with the duty to weigh carefully the liberty of citizen in a democratic country and the need of the society to detain such person. The preciousness, immense necessity to acknowledge such rights and the sancity of liberty are obvious from the principles laid down by law far back in this respect. Still, to understand, the concept and the importance of

the right enshrined under Article 22(5) of the Constitution of India, it is necessary to refer to the observation made by the Apex Court in the matter of Union of India Vs. Paul Manickam and another, as reported in 2003 (8) SCC 342 dealing with the constitutional philosophy of such right, the Apex Court observed as under in paragraph Nos.8, 9, 10, 11 and 12.

"8. It has been said that the history of liberty has largely been the history of observance of procedural safeguards. The procedural sinews strengthening the substance of the right to move the court against executive invasion of personal liberty and the due dispatch of judicial business touching violations of this great right is stressed in the words of Lord Denning as follows:

"Whenever one of the King's Judges takes his seat, there is one application which by long tradition has priority over all other, counsel has but to say: My Lord, I have an application which concerns the liberty of the subject and forthwith the Judge will put all other matters aside and hear it. It may be an application for a writ of habeas corpus, or an application for bail but whatever form it takes, it is heard first". (Freedom under the Law, Hamlyn Lectures, 1949.)

9. The constitutional philosophy of personal liberty is an idealistic view, the curtailment of liberty for reasons of the State's security, public order, disruption of national economic discipline etc. being envisaged as a necessary evil to be administered under strict constitutional restrictions. In Icchu Devi Choraria v. Union of India this judicial commitment was highlighted in the following words: (SCC p.538, para 5).

"The Court has always regarded personal liberty as the most precious possession of mankind and refused to tolerate illegal detention, regardless of the social cost involved in the release of a possible renegade.

* * *

This is an area where the Court has been most strict and scrupulous in ensuring observance with the requirements of the law, and even where

a requirement of the law is breached in the slightest measure, the Court has not hesitated to strike down the order of detention...."

10. In Vijay Narain Singh v. State of Bihar Justice Chinnappa Reddy in his concurring majority view said: (SCC p.19, para 1 : AIR p. 1336)

"..... I do not agree with the view that 'those who are responsible for the national security or for the maintenance of public order must be the sole judges of what the national security or public order requires'. It is too perilous a proposition. Our Constitution does not give a carte blanche to any organ of the State to be the sole arbiter in such matters."

" There are two sentinels, one at either end. The legislature is required to make the law circumscribing the limits within which persons may be preventively detained and providing for the safeguards prescribed by the Constitution and the courts are required to examine, when demanded, whether there has been any excessive detention, that is, whether the limits set by the constitution and the legislature have been transgressed." (SCC p.19, para 1).

11. In Hem Lall Bhandari v. State of Sikkim (AIR at p. 766) it was observed: (SCC p.14, para 12)

"It is not permissible, in matters relating to the personal liberty and freedom of a citizen, to take either a liberal or a generous view of the lapses on the part of the officers."

12. So far as the pivotal question whether there was delay in disposal of the representation is concerned, the same has to be considered in the background of Article 22(5) of the Constitution. A constitutional protection is given to every detenu which mandates the grant of liberty to the detenu to make a representation against detention, as imperated in Article22(5) of the Constitution. It also imperates the authority to whom the representation is addressed to deal with the same with utmost expedition. The representation is to be considered in its right perspective keeping in view the fact that the detention of the detenu is based on the

subjective satisfaction of the authority concerned, and infringement of the constitutional right conferred under Article 22(5) invalidates the detention order. Personal liberty protected under Article 21 is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law. The stringency and concern of the judicial vigilance that is needed was aptly described in the following words in Thomas Pacham Dale's case :

"Then comes the question upon the habeas corpus. It is a general rule, which has always been acted upon by the courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue."

11. From the above decision, it is clear that the right as guaranteed by Article 22(5) of the Constitution of India is precious and violation of such right would render the detention under the preventive law, illegal and invalid. When the matter is viewed from this angle, it becomes very clear that the crux is violation of the right or extinguishment of such right for any reason whatsoever. As aforesaid, this is a case of fact of its own kind and unique. It is not the case where the detaining authority delayed the adjudication of representation of the petitioner nor the State Government caused delay in deciding the representation and violated, the right as guaranteed under the Constitution of India. This is the case wherein, the representation did not reach upto such authorities and no fault could be found either with the detaining authority or with the State Government. The crux of the matter, therefore, is whether the right of exercised by the petitioner resulted in adjudication according to law. The answer is in the negative undoubtedly.

12. Having regard to the peculiar facts of the case and having regard to the importance of the right as explained by the Apex Court in the decision of Union of India Vs. Paul Manickam and another, it is very clear that if such right is violated or lost for whatever reasons even the concerned authority under the detention law may not be at fault, the further detention of the

detenu becomes illegal on account of such right of liberty being in breached. The petitioner duly addressed representation to the detaining authority which never reached to the detaining authority. The error was committed by the postal services, but these circumstances would all the same, affect adversely the right guaranteed as aforesaid. Therefore, in this case though the detaining authority or the State Government cannot at all be blamed for causing delay in adjudication of the representation preferred by the petitioner, because the same never reached to them, it must be held that the right of the petitioner as guaranteed under Article 22(5) is lost on account of the error committed by the postal services in misdelivering the post to some else instead of addressee i.e. detaining authority. The further detention of the petitioner, therefore, must be held invalid and illegal in view of the above discussion.

13. In the result, the petition is allowed. The order passed by the Police Commissioner, Surat City on 25th June, 2004, against the petitioner in exercise of powers under Section 3(1) of the PASA Act is hereby quashed and set aside. The detenu SAIYED REAFIK SAIYED KADIR is hereby ordered to be set at liberty forthwith if he is not required to be detained in jail for any other purpose. Rule is made absolute. Direct service is permitted.

[J. R. VORA,J.]

(vijay)